LEMBAGA LETRIK NEGARA, MALAYSIA *a*

v.

D. RAMAKRISHNAN

FEDERAL COURT, PENANG
RAJA AZLAN SHAH CJ (MALAYA)
ABDUL HAMID OMAR FJ
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 240 OF 1980]
11 MAY 1982 *b*

TORT: *Negligence - Erection of terminal steel pole which carried high Voltage electric wires - No anti-climbing devices - Respondent electrocuted on climbing to release a bird trapped on the wire - Duties of occupier - Whether appellants owe a duty and if so, any breach - Whether respondent guilty of contributory negligence.* *c*

This is an appeal against the decision of the High Court, Penang which awarded the respondent RM34,000 as damages for personal injuries. The trial proceeded on the issue of liability. *d*

On 25 April 1975, the respondent then 10 years old who climbed a terminal steel pole known as H-pole which carried high-voltage electric wires in an apparent attempt to release a bird trapped on the wire on top of the pole got electrocuted and thrown to the ground which resulted in severe injuries and permanent disfiguring. The claim was based on the negligence of the appellants in having erected and maintained the H-pole adjoining unfenced foot-path which contributed a dangerous hazard and allurement to the respondent and for breach of statutory duty. The defence was a bare denial of negligence and breach of statutory duty but during arguments at the trial and the appeal it contended that the respondent was a trespasser and consequently the relationship of occupier/ trespasser fell into consideration. *e*

Held: *f*

[1] The appellants owed a duty to the respondent. They had erected, maintained and controlled a highly dangerous H-pole of hidden lethal potentialities which was within easy reach of children and it was ideally suited for children wishing to climb it. They must be assumed to have known that children could be mischievous and could do things without realising the consequences and therefore there was a "substantial chance" that they might come there. There was a duty "because of the existence, near to the public, of a dangerous situation." *g*

[2] The appellants must give an "all embracing" consideration to what they should do, taking into account the seriousness of the danger, the degree of likelihood of trespassers coming, and the degree of hidden or unexpected danger to which they may be exposed if they come, giving more weight to these factors if the trespassers are likely to be children. The test here is that they must act in a humane manner. *h*

[3] There was evidence that they knew of facts relevant to the time and place of the accident which would fairly lead a humane and sensible man, reflecting on those facts known to him which such a man would take into account, to draw the inference that there was a likelihood that in the absence of precautions, an accident could happen of the nature of the accident which in fact happened. *i*

[4] Common sense and common humanity dictated that steps such as putting up warning signs and anti-climbing devices, should be taken which the appellants did not do. The appellants were in breach of the duty owned by them to the respondent resulting in the injury to him. Therefore, the decision of the learned Judge is upheld but for the reasons which have been indicated above.

[5] The negligence of the appellants consisted in erecting, maintaining and controlling a highly dangerous pole with hidden lethal potentialities near a public foot-path where there is a substantial chance that children may come and the absence of any warning or anti-climbing device that there was imminent peril to climb it. The respondent's action in climbing the pole can afford no excuse to the appellants when it is found that the pole is within easy reach of children and ideally suited for them wishing to climb it and that it was prudent to put up a warning sign or anti-climbing device.

[6] It is a fair inference from the evidence that it was the dangerous situation created by the appellants which the respondent neither knew, nor could he be expected to know, which brought about him misadventure. The Court is accordingly of the opinion that on the facts of this case, the respondent could not be held guilty of contributory negligence.

[7] The appeal is accordingly dismissed with costs.

[Appeal dismissed with costs.]

Cases referred to:
Donoghue v. Stevenson [1932] AC 562
Munnings & Anor. v. The Hydro-Electric Commission [1971] 125 CLR 1
Buckland v. Guildford Gas Light and Coke Co. [1949] 1 KB 410
Thompson v. Bankstown Corporation [1952-53] 87 CLR 619
Commissioner for Railways v. Quinlan [1954] AC 1054
British Railways Board v. Herrington [1972] AC 877
Southern Portland Cement Limited v. Cooper [1974] AC 623
McCarthy v. Wellington City [1966] NZLR 481
Lengyel v. Manitoba Power Commission [1957] 12 DLR (2d) 126
Nixon v. Manitoba Power Commission [1959] 21 DLR (2d) 68
Jones v. City of Calgary [1969] 3 DLR (3d) 455
Davis v. St. Mary's Demolition Co. Ltd. [1954] 1 WLR 592
Creed v. McGeoh & Sons Ltd. [1955] 1 WLR 1005
Yachuk v. Oliver Blais Co., Ltd [1949] 2 All ER 150
Bonnington Castings Ltd. v. Warlaw 1956 AC 613
Lynch v. Nurdin [1841] 1 QB 38

For the appellants - Cecil Abraham
For the respondent - Sri Ram (V. Sithambaram with him)

JUDGMENT

Raja Azlan Shah CJ (Malaya):

This is an appeal from the decision of the High Court, Penang in an action for damages for personal injuries in which the present respondent is the plaintiff and present appellants are defendants. The learned Judge found for the plaintiff and awarded RM34,000 as agreed damages. The trial proceeded on the issue of liability.

The claim was based on the negligence of the appellants in having erected and maintained a terminal steel pole more commonly known as H-pole which carried high-voltage electric wires immediately adjoining an unfenced public foot-path in a padi field in Bayan Lepas,

Penang (opposite the international airport) which H-pole and wires constituted a dangerous hazard and allurement to the respondent and for breach of statutory duty under the Electricity Regulations 1951 (LN 406/51). The defence was a bare denial of negligence and breach of statutory duty but in the course of the arguments before the learned Judge and repeated before us, the main contention was that the respondent was a trespasser and therefore the relationship of occupier/trespasser fell into consideration. The learned trial Judge decided the case on the basis that it was a straightforward case of negligence based on the *Donoghue v. Stevenson* [1932] AC 562 principle. He relied on the Australian case of *Munnings & Anor. v. The Hydro-Electric Commission* [1971] 125 CLR 1 where it was held that the liability should be determined by reference to the standard of care owed by an undertaker maintaining a highly dangerous electrical transmission system over the land to another to which the plaintiff, a boy aged 11 years and other children resorted, and the English case at first instance in *Buckland v. Guildford Gas Light and Coke Co.* [1949] 1 KB 410 where a girl aged 13 years was electrocuted while climbing a readily climbable tree immediately below high-voltage electric wires, the property of the defendants, in a farmer's filed. The learned Judge however, failed to consider the issue of contributory negligence which was pleaded in the statement of defence.

There is little or no dispute about the facts. In pursuance of its function to provide electricity in the island of Penang the predecessors of the appellants, the Lembaga Pengurusan Kerajaan Tempatan, Pulau Pinang, erected and maintained the H-pole which was situated immediately adjoining to a foot-path connecting a *kampung* consisting of 150 to 200 houses, to the Bayan Lepas main road where there are 3 schools. The foot-path was used by the *kampung* folk and children as a public foot-path leading to the main road. The appellants were very much aware of the existence of the footpath before the accident and admitted that they did not take any step, and that it was prudent, to put up anti-climbing devices e.g. warning signs, barbed wires or spikes on the H-pole in view of its potential danger and its proximity to the foot-path.

On 25 April 1975 the respondent then aged 10 years was walking along the foot-path with a group of boys when he was moved to climb the H-pole in an apparent attempt to release a bird trapped on the wire on top of the pole but upon reaching the bracket or cross-arm supporting the cable box which is about 7 feet from the ground level there was a flashover which resulted in the respondent being electrocuted and thrown to the ground. As a result he suffered severe injuries and first and second degree burns which resulted in scars and permanent disfiguring.

The learned Judge held that:

> There is no need for the pole to be an allurement as the danger potential of the pole is so great that some form of precaution should have been considered necessary to ensure no one came to or attempted to climb the pole. The proximity of a path which led to the main road from a *kampung* inhabited should have made it reasonably foreseeable that people will be near the pole. ... In the present case the defendant ought to have known poles in unoccupied land especially H-poles will invariably tempt children to climb them, even if it was not for the purpose of releasing birds trapped on top of them. And there was nothing whatsoever to suggest that there was imminent peril in climbing them. And the defendant had therefore not discharged their duty of care to others when installing and maintaining that H-pole.

The difficulty in deciding this appeal arises from the possibility and perhaps the necessity of choosing between two competing categories of the law of torts and applying one of them to the facts to the exclusion of the other. One category concerns the duties of an occupier

of a structure with respect to the safety of those who come upon it or within the area of the control exercised or exercisable by the occupier. The other category forms part of the general law of negligence based on the *Donoghue v. Stevenson* (*supra*) principle and relates to the duty of exercising a high standard of care falling upon those controlling an extremely dangerous entity, such as electricity of a lethal voltage.

We first consider two Australian cases, *Thompson v. Bankstown Corporation* [1952-53] 87 CLR 619, and *Munnings v. The Hydro-Electric Commission* (*supra*). In *Thompson's* case a boy aged thirteen years, in endeavouring to reach a bird's nest some eight to ten feet from the ground, in a ledge in a decayed portion of a pole which had been erected by the defendants on a public road for the purposes of carrying high tension wires, was electrocuted as a result of the neglected maintenance and control by the defendants of their overhead electric wires and the High Court dealt with the matter as an occupier/trespasser case but held that the duty of care sprang from the creation of a highly dangerous situation. If not occupier/trespasser, there was a relationship of occupier/person who had no right to be there. The basis of liability seems to be that the defendants had created or allowed a highly dangerous situation to arise in relation to high tension wires.

Thompson's case reflects a tendency towards the recognition of a general duty of care independent of the liability that might arise from the relation of occupier/trespasser. The concept of general duty of care, co-existing with the limited duties arising from occupation of land available to the plaintiff was most strikingly emphasized in the judgment of Kitto J at pp. 642/643:

> The respondent's contention appears to assume that the rule of law which defines the limits of the duty owed by an occupier to a trespasser goes so far as to provide the occupier with an effective answer to any assertion by the trespasser that during the period of the trespass the occupier owed him a duty of care. The assumption is unwarranted, for the rule is concerned only with the incidents which the law attaches to the specific relation of occupier and trespasser. It demands, as Lord Uthwatt said in *Read v. J. Lyons & Co. Ltd* [1947] AC 156, at p. 185, a standard of conduct which a reasonably-minded occupier with due regard to his own interests might well agree to be fair and a trespasser might in a civilized community reasonably expect. It would be a misconception of the rule to regard it as precluding the application of the general principle of *M'Alister (or Donoghue) v. Stevenson (Pauper)* [1932] AC 562, to a case where an occupier, in addition to being an occupier, stands in some other relation to a trespasser so that the latter is not only a trespasser but is also the occupier's neighbour, in Lord Atkin's sense of the word: see *Transport Commissioners of New South Wales v. Barton* [1933] 49 CLR, at pp. 122, 127 *et seq.*

Thompson's case was applied in *Munning's* case, which was also concerned with high tension electric wires placed in proximity to places where children might be and the duty was that owed by an undertaker maintaining a highly dangerous electrical transmission system over the land of another to which the boy and other children resorted.

This concept of a concurrent liability was criticised by Viscount Radcliffe in *Commissioner for Railways v. Quinlan* [1954] AC 1054, 1081 thus:

> Their Lordships cannot find any line of reasoning by which the limited duty that an occupier owes to a trespasser can co-exist with the wider general duty of care appropriate to the *Donoghue v. Stevenson* (*supra*) formula.

The House of Lords in *British Railways Board v. Herrington* [1972] AC 877 approved and adopted the principle in *Quinlan's* case that an occupier does not owe a trespasser the common duty of care and foresight as expressed in *Donoghue v. Stevenson*. It did not support a concurrent liability rule. Lord Reid pointed out (at p. 899) that the occupier does not voluntarily assume a relationship with trespassers. By trespassing they force a "neighbour" relationship on him. The Privy Council in *Southern Portland Cement Limited v. Cooper* [1974] AC 623 made similar emphasis on this, Lord Reid reiterating (at pp. 643, 644):

> That, it must be remembered that the neighbourhood relationship has been forced on the occupier by the trespasser and it would therefore be unjust to subject him to the full obligations resulting from it in the ordinary way.

We are aware that both *Herrington* and *Cooper* have been the subject of proffered criticism by text-book writers and the Law Commission that this branch of the law has become "over-refined", that they created more problems than solved them and that-legislative action was necessary. The Law Commission had proposed that, in essence, the common duty of care should be owed to trespassers, and that the criteria favoured in *Herrington* and *Cooper* be rejected. (See Working Paper No. 52/1973 at p. 26). We are also aware that judicial recognition of the plaintiff's problem has been universal in most common law countries but their response is less inhibited than their counterpart in England. In Australia, New Zealand and Canada, the occupiers' liability to trespassers is based on the broad principles of negligence. See *Munnings v. The Hydro Electric Commission* (*supra*); *McCarthy v. Wellington City* [1966] NZLR 481; *Lengyel v. Manitoba Power Commission* [1957] 12 DLR (2d) 126; *Nixon v. Manitoba Power Commission* [1959] 21 DLR (2d) 68; *Jones v. City of Calgary* [1969] 3 DLR (3d) 455. *Jones v. City of Calgary* [1969] 3 DLR (3d) 455. See also the American Law Institute's Restatement of *The Law of Torts* (s. 339) relating to the liability of occupiers for artificial conditions highly dangerous to trespassing children. Because of the unbreakable stanglehold of *stare decisis* we are bound by the Privy Council decision in *Cooper*, if it is applicable.

We conclude that on the evidence the present case is a case of occupier/trespasser on the simple ground that the respondent trespassed on the property of the appellants and therefore the *Herrington* and *Cooper* principles are applicable. It was said in argument that that is not so because the appellants are not the occupiers of the land on which the H-pole stood and therefore owed a higher degree of care of the type illustrated in *Donoghue v. Stevenson* (*supra*). When discussing this aspect of the case, one readily brings to mind such cases at *Buckland v. Guildford Gas Light and Coke Co.,* (*supra*), *Munnings & Anor. v. The Hydro-Electric Commission* (*supra*), both cases relied upon by the learned Judge, and *Davis v. St. Mary's Demolition Co. Ltd.* [1954] 1 WLR 592 and *Creed v. McGeoh & Sons Ltd.* [1955] 1 WLR 1005.

It must be said in passing that all these four cases were referred to and commented upon by Lords Wilberforce (p. 914), Pearson (p. 924, 929) and Diplock (p. 943) in *Herrington's* case. Without going into the matter at length, the balance of the *dicta* in *Herrington's* case point toward the removal of any sharp distinction between occupiers and non-occupiers in this respect, so that the plaintiff's being a trespasser would be relevant in a claim against either. (See also *Winfield & Jolowicz on Tort* 11th Edn. at p. 214). Lord Diplock in particular left the matter open as "the instant case is not appropriate one in which to deal with the liability to trespassers of persons who are not the occupiers of the land on which the trespass is committed." (p. 943). We would reiterate what Lord Reid said in *Cooper's* case at pp. 643, 644 referred to earlier in this judgment.

In *Herrington's* case the defendants owned an electrified railway line which was fenced off from a meadow where children lawfully played. The defendants knew that the fence was dilapidated and that children played on the line, but they did not repair the fence. The six-year-old plaintiff walked over the broken fence, trespassed on to the railway track and was severely burned by the live line. The House of Lords unanimously held the defendants liable; Lord Reid found that no individual had acted inhumanly but that the defendants stood condemned as a result of "general slackness in the organization". (Page 900).

The facts in *Cooper's* case were that the defendant quarries created a large mound of waste material on their premises so as to get a gradient for railway shunting purposes. After some months of dumping - which had continued despite the defendants' superintendent's orders to stop - the mound had engulfed some high tension electricity poles, and eventually the gap between the top of the mound and the cables themselves was small. Children were accustomed to play in two places near, but outside, the defendants' land, and these were only a few hundred yards from the mound which was plainly visible from those areas. It was from one such area that the plaintiff, a boy aged thirteen, and his friend went to play on the mound. While so doing, the plaintiff's arm came into contact with the electric cable and was injured. The Privy Council, as did the High Court of Australia, found the defendants liable.

In *Herrington's* case there were five separate speeches and amidst such a bewildering array of tests with their imprecisely defined terms, it is difficult to express precisely; the *ratio decidendi* of the case. In positive terms, the case, which was followed in essence by the Privy Council in *Cooper's* case decided, first, that there is a duty owed by the owner/occupier to a trespasser whose presence is either known or reasonably to be anticipated; "when he knows facts which show a substantial chance that they may come there" (see *Cooper's* case at p. 644); and secondly, that the measure of that duty is the dictates of common humanity. This test of humanity is nothing new. Lord Reid in *Cooper's* case (pp. 642, 643) pointed out that:

> Their Lordships are breaking no new ground in holding that the nature and extent of an occupier's duty to a trespasser must be based on considerations of humanity. As long ago as 1820 in *Hott v. Wilkes* [1820] 3 B & Ald. 304, a case dealing with injury to a trespasser by a spring gun, Best J said, at p. 319: 'the law of England will not sanction what is inconsistent with humanity.' In *Grand Trunk Railway Co. of Canada v. Barnett* [1911] AC 361, the judgment of the Board refers, at p. 370, to 'wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care'.

The nature and extent of that duty is lower than that which would be expected of the reasonable man in the ordinary law of negligence. The nature of the duty depends on what the defendant knew, as distinct from what he ought reasonably to have known. Thus the owner/occupier comes under a duty only if it is shown first, that he actually knew of the trespasser's presence or at least of facts which rendered his presence substantially likely; and secondly, that he actually knew facts relating to the condition of the land or the activities on it which would be likely to cause personal injury to such a trespasser who was unaware of the danger (per Lord Diplock at p. 941). It is not enough, as it would be in a negligence case, that he ought to have known of these matters. Further, the extent of the duty falls short of the reasonable man standard, since what is expected of the owner/occupier in discharging his duty varies with his personal circumstances and capacity to deal with the danger, such as his knowledge, skill and

resources of money and labour (per Lord Reid at p. 899; per Lord Wilberforce at p. 920; per Lord Diplock at p. 796). Lord Reid in *Cooper's* case (at p. 644) divided dangers in respect of which the duty is owed into dangers which the occupier had not created and those which he had. With respect to dangers which have arisen on his land without his knowledge the occupier can have no obligation to make enquiries or inspection. With regard to those which he has knowledge but which he did not create he cannot be expected to incur what for him would be a large expense. But if he created the danger when he knows that there was a chance that trespassers will come that way and would not see or realize the danger he may have to do more. The more serious the danger the greater is the obligation to avoid it and if the dangerous thing or something near it is an allurement to children that may greatly increase the chance that children will come there.

In summary, then, the duty owed to trespassers arises when the occupier knows facts which show a substantial chance that they may come to a place where there is a danger which he has created or knows about, and the duty is discharged by the occupier taking such steps in accordance with the dictates of common humanity and in the light of his own circumstances and financial limitations.

It now becomes necessary to consider whether the appellants had any, and if so what, duty to the respondent, and if they did owe a duty to him whether they were in breach of it, with the result that he suffered injury.

We are satisfied that the appellants owed a duty to the respondent. They had erected, maintained and controlled a highly dangerous H-pole of hidden lethal potentialities immediately adjacent to a foot-path connecting the *kampung* to the Bayan Lepas main road which was used by the *kampung* folk including children. The pole was within easy reach of children and it was ideally suited for children wishing to climb it. They must be assumed to have known that children could be mischievous and could do things without realising the consequences and therefore there was a "substantial chance" that they might come there. There was a duty "because of the existence, near to the public, of a dangerous situation." (per Lord Wilberforce in *Herrington* at p. 920).

Given that a danger is present and a duty exists what must the appellants do? The answer is that they must give an "all embracing" consideration to what they should do, taking into account the seriousness of the danger, the degree of likelihood of trespassers coming, and the degree of hidden or unexpected danger to which they may be exposed if they come, giving more weight to these factors if the trespassers are likely to be children. Such considerations are to be made in the light of their financial and other limitations, and of every kind of disadvantage that may accrue to them if they take or refrain from action for the benefit of trespassers. The test here is that they must act in a humane manner. In the present case there was evidence that they knew of facts, relevant to the time and place of the accident, which would fairly lead a humane and sensible man, reflecting on those facts known to him which such a man would take into account, to draw the inference that there was a likelihood that in the absence of precautions, an accident could happen of the nature of the accident which in fact happened. Common sense and common humanity dictated that such steps e.g. putting up warning signs and adequate anti-climbing devices, should be taken. They did not do that. We therefore conclude that they were in breach of the duty owed by them to the respondent, resulting in the injury to him. We would therefore uphold the decision of the learned Judge but for the reasons which we have indicated above.

Was the respondent guilty of contributory negligence? The allegation here is really that the respondent failed to take reasonable care for his own safety. It is said that he should not have climbed the pole in view of the dangerous situation overhead. We must consider his age and the circumstances of the case. The test is an objective one; it is whether an ordinary child of the respondent's age and experience - not a "paragon of prudence" nor a "scatter-brain" - would have taken any more care than did the respondent [per Salmon LJ in *Gough v. Thorne* [1966] 3 ALL ER 398.

In *Yachuk v. Oliver Blais Co., Ltd* [1949] 2 All ER 150, the Privy Council held that a boy aged nine-years, had not been guilty of contributory negligence for he neither knew nor could he be expected to know the peculiarly dangerous quality of gasoline; he was never warned about the properties of gasoline. In that case an employee of the respondents, proprietors of a filling station, supplied petrol to the boy. Though the boy told the employee that he wanted the petrol for his mother's car which was "stuck down the road", he really wanted it for a game of Red Indians. In the course of this game he ignited the petrol and injured himself. In *Gough v. Thorne* (*supra*) a girl aged 13½ years was held to be not contributory negligent in crossing the road on a signal from a lorry driver without checking that the way was clear beyond the lorry; it was wrong to hold that a girl of 13½ was negligent because she failed to ponder whether it was safe to cross the road and relied unquestioningly on the lorry driver's signal. That indeed might be reasonably expected of a grown-up person with a fully developed road sense, but not a child of 13½.

Here the respondent and a group of boys were walking along the foot-path when he saw a bird trapped on the wires on top of the pole which was a danger imperceptible by a child of the respondent's age simply because he was not old enough to see the dangerous situation; whether or not it was obvious to his eye, it was concealed from his understanding. A careful examination of the evidence has satisfied us that the respondent did not know nor could he be expected to know of the dangerous situation. He has never been told or warned of such danger. He himself said, what is likely enough, that he did not know what electricity was; that it was dangerous. He thought the electric wires were cables for some purposes. He had not seen such cables in his house. On the evidence then, it is in our view, impossible to regard him as any more capable of taking care of himself in the circumstances in which he was placed than a normal boy of his age might be expected to be.

The negligence of the appellants consisted in erecting, maintaining and controlling a highly dangerous pole with hidden lethal potentialities near a public foot-path where there is a substantial chance that children may come and the absence of any warning or anti-climbing device that there was imminent peril to climb it. The fact that the respondent climbed the pole, a fact on which the appellants' counsel much relied to show that the effective cause of the accident was the deliberate act of folly by the respondent, and therefore, the breach of duty by them had not "caused or materially contributed to his damage" (per Lord Reid in *Bonnington Castings Ltd. v. Warlaw* 1956 AC 613, 620), cannot avail the appellants in view of the evidence. To place the dangerous pole there is to subject him to temptation and the risk of injury. The respondent's action in climbing the pole can afford no excuse to the appellants when it is found that the pole is within easy reach of children and ideally suited for them wishing to climb it and that it was prudent to put up a warning sign or anti-climbing device. In the circumstances, therefore, we would adopt the words of Denman, CJ, in *Lynch v. Nurdin* [1841] 1 QB 38:

> The most blameable carelessness of his servant having tempted the child, he (the defendant) ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it.

It is a fair inference from the evidence that it was the dangerous situation created by the appellants which the respondent neither knew, nor could he be expected to know, which brought about his misadventure. We are accordingly of the opinion that on the facts of this case, the respondent could not be held guilty of contributory negligence.

We would accordingly dismiss the appeal with costs.

Also found at [1982] CLJ 401